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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

10 KRISTIN HARDY,

11 Plaintiff,

12 v.

13 KELLY SANTORO, et al.,

14 Defendants.

Case No. 1:21-cv-00327-EPG (PC)

FINDINGS AND RECOMMENDATIONS,  
RECOMMENDING THAT THIS ACTION  
BE DISMISSED FOR FAILURE TO  
STATE A CLAIM

(ECF No. 16)

16 OBJECTIONS, IF ANY, DUE WITHIN  
17 TWENTY-ONE DAYS

18 ORDER DIRECTING CLERK TO ASSIGN  
DISTRICT JUDGE

19 Kristin Hardy ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma pauperis* in  
20 this civil rights action. Plaintiff filed the complaint commencing this action on March 1, 2021.  
21 (ECF No. 1). On March 24, 2021, the Court screened Plaintiff's complaint and found that it  
22 failed to state any cognizable claims. (ECF No. 11). The Court gave Plaintiff thirty days to  
23 either: "a. File a First Amended Complaint; or b. Notify the Court in writing that he wants to  
24 stand on his complaint." (*Id.* at 10-11).

25 On April 21, 2021, Plaintiff filed his First Amended Complaint. (ECF No. 16). The  
26 Court has reviewed Plaintiff's First Amended Complaint, and for the reasons described in this  
27 order will recommend that this action be dismissed for failure to state a claim.

28 Plaintiff has twenty-one days from the date of service of these findings and

1 recommendations to file his objections.

2 **I. SCREENING REQUIREMENT**

3 The Court is required to screen complaints brought by prisoners seeking relief against a  
4 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).  
5 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
6 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or  
7 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.  
8 § 1915A(b)(1), (2). As Plaintiff is proceeding *in forma pauperis* (ECF No. 9), the Court may  
9 also screen the complaint under 28 U.S.C. § 1915. “Notwithstanding any filing fee, or any  
10 portion thereof, that may have been paid, the court shall dismiss the case at any time if the court  
11 determines that the action or appeal fails to state a claim upon which relief may be granted.”  
12 28 U.S.C. § 1915(e)(2)(B)(ii).

13 A complaint is required to contain “a short and plain statement of the claim showing  
14 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are  
15 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
16 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell  
17 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). A plaintiff must set forth “sufficient  
18 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id.  
19 (quoting Twombly, 550 U.S. at 570). The mere possibility of misconduct falls short of meeting  
20 this plausibility standard. Id. at 679. While a plaintiff’s allegations are taken as true, courts  
21 “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d  
22 677, 681 (9th Cir. 2009) (citation and internal quotation marks omitted). Additionally, a  
23 plaintiff’s legal conclusions are not accepted as true. Iqbal, 556 U.S. at 678.

24 Pleadings of *pro se* plaintiffs “must be held to less stringent standards than formal  
25 pleadings drafted by lawyers.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (holding that  
26 *pro se* complaints should continue to be liberally construed after Iqbal).

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1           **II.       SUMMARY OF PLAINTIFF’S FIRST AMENDED COMPLAINT**

2           Plaintiff alleges as follows in his First Amended Complaint:

3           On January 1, 2019, the facility “A” dayroom program was suspended due to a cell  
4 search of two Hispanic inmates. That same day, a large group of correctional officers entered  
5 the building and began conducting systematic cell and unclothed body searches.

6           Plaintiff was ordered by an unidentified correctional officer to remove his clothing, to  
7 lift his arms, to lift his scrotum, and to bend over at the waist and cough. No contraband was  
8 found on Plaintiff’s person or in his cell. Prison official subsequently placed Facility “A” on a  
9 “modified program” while buildings 1, 3, 4, and 5 were also searched.

10          Upon information and belief, the modified program and searches of Facility “A” were  
11 approved by defendant Santoro via Program Status Report (“PSR”), and allegedly due to some  
12 unidentified inmate being targeted for murder.

13          Five days later, on January 6, 2019, after searches were complete, Plaintiff was inside of  
14 his assigned cell when he noticed a large group of correctional officers enter his building.

15          An officer whom Plaintiff identified as defendant Valencia opened Plaintiff’s cell door  
16 and ordered Plaintiff to remove his clothing. Plaintiff asked defendant Valencia what was  
17 going on and explained that he had just been subjected to a cell and unclothed body search five  
18 days before. Defendant Valencia did not respond or give a basis for the search.

19          Plaintiff then removed all of his clothing except his boxer shorts. After inspecting  
20 Plaintiff’s clothing, defendant Valencia went a step further and ordered Plaintiff to also remove  
21 his boxer shorts.

22          Plaintiff, seeking to protect his body from invasion of privacy and unreasonable search,  
23 refused to strip completely nude. Defendant Valencia then summoned defendant Moreno for  
24 assistance.

25          Defendant Moreno ordered Plaintiff to take off his boxers. Plaintiff again declined to  
26 get completely nude in order to protect his bodily privacy from unreasonable search.

27          Defendant Moreno then ordered Plaintiff detained, and Plaintiff was escorted to the Facility  
28 “A” gymnasium and placed in a holding cage.

1 Said cage was then surrounded by defendants Moreno, Valencia, Chavez, Dohs, and  
2 Ceballos. Said defendants then began to be psychologically coercive, making verbal threats to  
3 place Plaintiff in restricted housing unless Plaintiff submitted to an unclothed body search.

4 Defendant Ceballos then interjected that Plaintiff would be charged with attempted  
5 murder unless he submitted to the search. At that point, defendant Moreno ordered defendant  
6 Chavez to handcuff Plaintiff and escort him to the visiting area, where he was ran through a full  
7 x-ray "low dose" body scanner. No contraband was found.

8 It is Plaintiff's understanding that on September 1, 2017, the Secretary of the California  
9 Department of Corrections and Rehabilitation proposed a rule change to implement the low  
10 dose body scanners and to make unclothed body searches redundant. Upon information and  
11 belief, said regulation change was in effect on January 1, 2019, and January 6, 2019.

12 After Plaintiff was x-rayed, he was escorted back to the gymnasium holding cage,  
13 where defendant Ceballos offered to send Plaintiff back to his assigned housing if he would  
14 submit to an unclothed search, despite the fact that Plaintiff had just been searched via x-ray  
15 machine.

16 Plaintiff, in fear of further retaliation and punitive actions by staff, submitted to a search  
17 in the nude. His mouth, ears, hands, arms, and anal area were searched. No contraband was  
18 recovered.

19 Plaintiff, while getting dressed, asked defendant Ceballos the justification for the  
20 searches of his person. Defendant Ceballos simply stated that defendant O'Daniel ordered a  
21 second comprehensive search of building A-2.

22 Upon information and belief, no other buildings on Facility "A" underwent a second  
23 comprehensive search. Pursuant to California Department of Corrections and Rehabilitation  
24 regulations, body and cell searches are to be conducted no more "[f]requently than necessary"  
25 to control contraband or recover stolen/missing property.

26 Upon return to his assigned quarters, Plaintiff observed his cell in complete disarray,  
27 with his mail and legal documents scattered about and various property items missing.

28 On January 9, 2019, Plaintiff filed an administrative appeal with defendant Santoro,

1 alleging retaliatory/punitive cell and body searches. The appeal was denied and no corrective  
2 action was taken.

3 Prior to filing this appeal, Plaintiff submitted several other appeals regarding retaliatory  
4 cell and body searches conducted by correctional staff at North Kern State Prison. Said  
5 searches occurred on August 16, 2017, June 4, 2018, June 15, 2018, and June 22, 2018.

6 The hiring authority, including defendants Kibler and O'Daniel, reviewed said appeals  
7 and took no corrective action. None of the defendants ever provided a legitimate penological  
8 basis as to why Plaintiff was subjected to two cell searches and three searches of his person in a  
9 five-day period.

10 Plaintiff appears to bring a claim under the First Amendment for retaliation and a claim  
11 under the Fourth Amendment for an unreasonable search.

### 12 **III. ANALYSIS OF PLAINTIFF'S COMPLAINT**

#### 13 **A. Section 1983**

14 The Civil Rights Act under which this action was filed provides:

15 Every person who, under color of any statute, ordinance, regulation, custom, or  
16 usage, of any State or Territory or the District of Columbia, subjects, or causes  
17 to be subjected, any citizen of the United States or other person within the  
18 jurisdiction thereof to the deprivation of any rights, privileges, or immunities  
secured by the Constitution and laws, shall be liable to the party injured in an  
action at law, suit in equity, or other proper proceeding for redress....

19 42 U.S.C. § 1983. “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely  
20 provides ‘a method for vindicating federal rights elsewhere conferred.’” Graham v. Connor,  
21 490 U.S. 386, 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see  
22 also Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los  
23 Angeles, 697 F.3d 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir.  
24 2012); Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006).

25 To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted  
26 under color of state law, and (2) the defendant deprived him of rights secured by the  
27 Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.  
28 2006); see also Marsh v. County of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing

1 “under color of state law”). A person deprives another of a constitutional right, “within the  
2 meaning of § 1983, ‘if he does an affirmative act, participates in another’s affirmative act, or  
3 omits to perform an act which he is legally required to do that causes the deprivation of which  
4 complaint is made.’” Preschooler II v. Clark County Sch. Bd. of Trs., 479 F.3d 1175, 1183  
5 (9th Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite  
6 causal connection may be established when an official sets in motion a ‘series of acts by others  
7 which the actor knows or reasonably should know would cause others to inflict’ constitutional  
8 harms.” Preschooler II, 479 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of  
9 causation “closely resembles the standard ‘foreseeability’ formulation of proximate cause.”  
10 Arnold v. Int’l Bus. Mach. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City  
11 of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008).

12 A plaintiff must demonstrate that each named defendant personally participated in the  
13 deprivation of his rights. Iqbal, 556 U.S. at 676-77. In other words, there must be an actual  
14 connection or link between the actions of the defendants and the deprivation alleged to have  
15 been suffered by the plaintiff. See Monell v. Dep’t of Soc. Servs. of City of N.Y., 436 U.S.  
16 658, 691, 695 (1978).

17 Supervisory personnel are not liable under section 1983 for the actions of their  
18 employees under a theory of *respondeat superior* and, therefore, when a named defendant  
19 holds a supervisory position, the causal link between the supervisory defendant and the claimed  
20 constitutional violation must be specifically alleged. Iqbal, 556 U.S. at 676-77; Fayle v.  
21 Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir.  
22 1978). To state a claim for relief under section 1983 based on a theory of supervisory liability,  
23 a plaintiff must allege some facts that would support a claim that the supervisory defendants  
24 either: were personally involved in the alleged deprivation of constitutional rights, Hansen v.  
25 Black, 885 F.2d 642, 646 (9th Cir. 1989); “knew of the violations and failed to act to prevent  
26 them,” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); or promulgated or “implement[ed]  
27 a policy so deficient that the policy itself is a repudiation of constitutional rights and is the  
28 moving force of the constitutional violation,” Hansen, 885 F.2d at 646 (citations and internal

1 quotation marks omitted).

2 For instance, a supervisor may be liable for his or her “own culpable action or inaction  
3 in the training, supervision, or control of his [or her] subordinates,” “his [or her] acquiescence  
4 in the constitutional deprivations of which the complaint is made,” or “conduct that showed a  
5 reckless or callous indifference to the rights of others.” Larez v. City of Los Angeles, 946 F.2d  
6 630, 646 (9th Cir. 1991) (citations, internal quotation marks, and brackets omitted).

7 **B. Plaintiff’s Claim for an Unreasonable Search in Violation of the Fourth**  
8 **Amendment**

9 The Fourth Amendment prohibits only unreasonable searches. Bell v. Wolfish, 441  
10 U.S. 520, 558 (1979); Byrd v. Maricopa County Sheriff’s Office, 629 F.3d 1135, 1140 (9th Cir.  
11 2011); Michenfelder v. Sumner, 860 F.2d 328, 332 (9th Cir. 1988). The reasonableness of the  
12 search is determined by the context, which “requires a balancing of the need for the particular  
13 search against the invasion of personal rights that the search entails.” Bell, 441 U.S. at 559.  
14 Factors that must be evaluated are “the scope of the particular intrusion, the manner in which it  
15 is conducted, the justification for initiating it, and the place in which it is conducted.” Id.; Bull  
16 v. City and County of San Francisco, 595 F.3d 964, 972 (9th Cir. 2010) (*en banc*).

17 The Fourth Amendment applies to the invasion of bodily privacy in prisons and jails.  
18 Bull, 595 F.3d at 974-75. “[I]ncarcerated prisoners retain a limited right to bodily privacy.”  
19 Michenfelder, 860 F.2d at 333. The United States Court of Appeals for the Ninth Circuit has  
20 long recognized that “[t]he desire to shield one’s unclothed figure from view of strangers, and  
21 particularly strangers of the opposite sex, is impelled by elementary self-respect and personal  
22 dignity.” York v. Story, 324 F.2d 450, 455 (9th Cir. 1963); see also Michenfelder, 860 F.2d at  
23 333 (same). “The [Supreme] Court [has] obviously recognized that not all strip search  
24 procedures will be reasonable; some could be excessive, vindictive, harassing, or unrelated to  
25 any legitimate penological interest.” Michenfelder, 860 F.2d at 332.

26 Once again, Plaintiff has not sufficiently alleged that the second strip search was  
27 unreasonable. Plaintiff is a prisoner, and has only “a limited right to bodily privacy.”  
28 Michenfelder, 860 F.2d at 333. The search itself, while invasive, appears to have been

1 conducted in relative privacy. Plaintiff appears to allege that only one officer conducted the  
2 search, and there is no indication that anyone else was able to view Plaintiff during the search.

3 It does not appear that Plaintiff was ever told why he was subjected to the second strip  
4 search, but in any event, there are no allegations in the complaint suggesting that the search was  
5 vindictive, conducted to harass Plaintiff, or unrelated to any legitimate penological interest.<sup>1</sup>

6 Plaintiff does allege that he was strip searched twice in five days. He also alleges, in a  
7 conclusory fashion, that certain defendants retaliated against him by subjecting him to the  
8 second strip search because he engaged in protected activity and speech. However, there was a  
9 gap between the first and second strip searches, and the second search occurred during a wide-  
10 spread search of building A-2. There are no factual allegations suggesting that this wide-spread  
11 search was conducted to harass Plaintiff, or that any defendant decided to strip search Plaintiff  
12 because Plaintiff engaged in protected activity and speech. Plaintiff does not identify any  
13 statements by the defendants connecting the alleged strip search to his protected activity. There  
14 are also no allegations suggesting that the defendants who conducted the second strip search  
15 knew that Plaintiff had engaged in protected activity.

16 Finally, Plaintiff appears to allege that the strip search violated policy because the  
17 regulation to allow the use of low dose body scanners was enacted to make body searches  
18 redundant. This allegation is insufficient to state a claim. “[A] violation of a prison regulation  
19 or policy is not a per se constitutional violation.” Brown v. Galvin, 2017 WL 6611501, at \*3  
20 (E.D. Cal. Dec. 27, 2017); accord Hilson v. Arnett, 2017 WL 6209390, at \*9 (E.D. Cal. Dec. 8,  
21 2017) (same).<sup>2</sup>

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23  
24 <sup>1</sup> Plaintiff does state that the January 1, 2019 searches of Facility “A” were allegedly due to some  
25 unidentified inmate being targeted for murder, and it appears that the January 6, 2019 search may have been a  
26 continuation of the first. This appears to be a legitimate penological interest for the searches.

27 <sup>2</sup> Additionally, nothing in the regulation itself states that low dose body scanners were meant to make  
28 strip searches redundant. The Notice of Proposed Regulatory Action does state that “[t]he low dose full body  
scanner is a non-intrusive device that scans the whole body in seconds, detecting the presence of contraband  
secreted or ingested inside the human body. The use of this device eliminates the need for an inmate to be  
subjected to an unclothed body search.” (ECF No. 16, p. 36). However, it also states that the CDCR “is  
*expanding* available searching tools for use on inmates to detect drugs and other contraband.” (*Id.* at 32)  
(emphasis added). Moreover, the regulation itself refers to inmates being subjected both to unclothed inspections  
and low dose body scanners. Cal. Code Regs. tit. 15, § 3287(b), (c).



1 Accordingly, Plaintiff has failed to sufficiently allege that the strip search was  
2 unreasonable, and thus has failed to state a Fourth Amendment claim for an unreasonable  
3 search against any defendant.

4 The Court notes that Plaintiff also alleges that some defendants harassed him into  
5 complying with their orders directing him to submit to a search by threatening to place him in  
6 restricted housing unless he submitted to the search. One defendant allegedly told him that he  
7 would be charged with attempted murder unless he submitted to the search.

8 However, as discussed above, Plaintiff has not sufficiently alleged that the search itself  
9 violated the constitution. And, verbal harassment is generally insufficient to state a  
10 constitutional violation. Allegations of name-calling, verbal abuse, or threats generally fail to  
11 state a constitutional claim. See Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996) (“[V]erbal  
12 harassment generally does not violate the Eighth Amendment.”), opinion amended on denial of  
13 reh’g, 135 F.3d 1318 (9th Cir. 1998); see also Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987)  
14 (holding that a prisoner’s allegations of threats allegedly made by guards failed to state a cause  
15 of action).

16 Verbal harassment may violate the constitution when it is “‘unusually gross even for a  
17 prison setting and [is] calculated to and [does] cause [plaintiff] psychological damage.” Cox v.  
18 Kernan, 2019 WL 6840136, at \*5 (E.D. Cal. Dec. 16, 2019) (alterations in original) (quoting  
19 Keenan, 83 F.3d 1083 at 1092). Plaintiff has not sufficiently alleged that the harassment was  
20 unusually gross even for a prison setting, and Plaintiff has not sufficiently alleged that the  
21 harassment was calculated to cause Plaintiff psychological damage.

### 22 **C. Plaintiff’s Claim for Retaliation**

23 There are five basic elements to a First Amendment retaliation claim: “(1) An assertion  
24 that a state actor took some adverse action against an inmate (2) because of (3) that prisoner’s  
25 protected conduct, and that such action (4) chilled the inmate’s exercise of his First  
26 Amendment rights, and (5) the action did not reasonably advance a legitimate correctional  
27 goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted).

1 While prisoners have no freestanding right to a prison grievance process, see Ramirez v.  
2 Galaza, 334 F.3d 850, 860 (9th Cir.2003), “a prisoner’s fundamental right of access to the  
3 courts hinges on his ability to access the prison grievance system,” Bradley v. Hall, 64 F.3d  
4 1276, 1279 (9th Cir.1995), overruled on other grounds by Shaw v. Murphy, 532 U.S. 223, 230  
5 n.2 (2001). Because filing administrative grievances and initiating civil litigation are protected  
6 activities, it is impermissible for prison officials to retaliate against prisoners for engaging in  
7 these activities. Rhodes, 408 F.3d at 567.

8 Retaliation claims are not limited to the First Amendment. “A prisoner suing prison  
9 officials under section 1983 for retaliation must allege that he was retaliated against for  
10 exercising his constitutional rights and that the retaliatory action does not advance legitimate  
11 penological goals, such as preserving institutional order and discipline.” Barnett v. Centoni, 31  
12 F.3d 813, 815-16 (9th Cir. 1994).

13 Plaintiff appears to allege that the second strip search and the cell search that occurred  
14 after (or during) the second strip search were retaliatory. However, Plaintiff has failed to allege  
15 that any defendant took an adverse action against Plaintiff because he engaged in protected  
16 conduct.

17 As described above, it does not appear that the second strip search was unconstitutional,  
18 and Plaintiff does not have a constitutional right to refuse to submit to such a search.  
19 Additionally, while Plaintiff alleges that certain defendants retaliated against him by subjecting  
20 him to the strip search and cell search because he engaged in protected activity and speech,  
21 there are no factual allegations supporting these conclusory assertions. Plaintiff does not  
22 identify any statements by the defendants connecting the alleged strip search or cell search to  
23 his protected activity. There are also no allegations suggesting that the defendants who  
24 conducted the strip search or cell search knew that Plaintiff had engaged in protected activity.  
25 Finally, there are no allegations that the alleged retaliatory conduct occurred near in time to  
26 Plaintiff engaging in protected conduct.

27 Thus, Plaintiff has not sufficiently alleged that he was retaliated against because he  
28 engaged in protected conduct. Accordingly, Plaintiff has failed to state a retaliation claim

1 under the First Amendment against any defendant.

2 **IV. CONCLUSION, RECOMMENDATIONS, AND ORDER**

3 The Court recommends that this action be dismissed without granting Plaintiff further  
4 leave to amend. In the Court's prior screening order, the Court identified the deficiencies in  
5 Plaintiff's complaint, provided Plaintiff with relevant legal standards, and provided Plaintiff  
6 with an opportunity to amend his complaint. Plaintiff filed his First Amended Complaint with  
7 the benefit of the Court's screening order, but failed to cure the deficiencies identified in the  
8 screening order. Thus, it appears that further leave to amend would be futile.

9 Accordingly, the Court HEREBY RECOMMENDS that:

- 10 1. This action be dismissed for failure to state a claim; and  
11 2. The Clerk of Court be directed to close this case.

12 These findings and recommendations will be submitted to the United States district  
13 judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
14 twenty-one (21) days after being served with these findings and recommendations, Plaintiff  
15 may file written objections with the Court. The document should be captioned "Objections to  
16 Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file  
17 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.  
18 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394  
19 (9th Cir. 1991)).

20 Additionally, IT IS ORDERED that the Clerk of Court is directed to assign a district  
21 judge to this case.

22  
23 IT IS SO ORDERED.

24 Dated: May 7, 2021

25 /s/ Eric P. Gray  
UNITED STATES MAGISTRATE JUDGE